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## THE JOINT RESOLUTION OF CONGRESS RESPECTING RELATIONS BETWEEN THE UNITED STATES AND CUBA.

### I.

ON March 2, 1901, the following Joint Resolution was enacted as an Amendment to the Army Appropriation Act:

That in fulfillment of the declaration contained in the Joint Resolution approved April 20, 1898, entitled, "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution<sup>1</sup> which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

1. That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

2. That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government, shall be in adequate.

3. That the government of Cuba consents that the

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<sup>1</sup> In the following discussion no account is taken of the work of the Constitutional Convention in Cuba, because the Convention being still in session, the Constitution it has drafted cannot be considered as a completed instrument.

United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

4. That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

5. That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

7. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

8. That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

The declaration contained in the Joint Resolution of April 20, 1898, reads as follows :

Fourth—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people.

## II.

### THE RESOLUTION AND OUR PROMISE TO CUBA.

Before considering the Resolution of 1901 in detail, it is important to determine whether it violates the declaration

of the Resolution of 1898 by the mere fact that it imposes conditions precedent to our evacuation of Cuba.

Some would dismiss this question altogether, and annex Cuba forthwith. It is argued that the declaration is not binding because it was made in a moment of excitement, or because it was never a real contract, but at best a promise without consideration, or because the Cubans are unfit to govern themselves. Less repulsive, because of its candor, is the masterful assertion that the United States need Cuba in their business, and do not intend to be balked by a promise. The corrective of these shifty and cynical evasions is found in the assurance that the declaration of 1898 is as binding on the conscience of the American people as though it were embodied formally in a treaty; and, in fact, it is substantially recognized in the Treaty of Paris. Altered conditions, violation of reciprocal engagements, impossibility of performance, have now and again been urged in justification or apology for disregarding international pledges. None of these pleas will avail here. The breaking of our pledge to Cuba would involve a gross breach of national faith that must at some time, in some way, bring retribution far outweighing any present material gains arising from a forcible annexation. To the flippant notion that there is really no moral law for nations, I oppose an admirable statement of the doctrine of national responsibility lately made by one of Great Britain's foremost jurists. "All my life," says Lord Hobhouse in a private letter, "I have insisted, with general acceptance one fancies, that the code of morals and justice is the same between nations as between individuals; with the addition that the nation which never dies is even more certain to reap the fruits of conduct, whether bitter or sweet, than the individual who may die before the fruits ripen."

The United States can honorably recall their promise only upon a request for immediate annexation preferred by the Cuban people. If this overture shall be made, the propriety of incorporating the island in the United States will be for the first time fairly presented for discussion.

While the declaration of 1898 should be respected as a binding promise, there is no merit either in the complaint

that our presence in Cuba to-day is a proof of bad faith, or in the assertion that our withdrawal must be absolutely unconditional. Three years ago I said :

“ The early installation of a Cuban government is desirable, not only for the sake of the Cubans, but because, pending this event, the United States must undertake the provisional control of the island. The undertaking will be sufficiently vexatious, even assuming, as I do, that it will be confided to trained soldiers and not to uniformed politicians. Yet it will be better to prolong our control than to recognize prematurely a Cuban government. When the authority of Spain shall disappear, the authority of the United States must replace it and prevail until a responsible local government shall be ready to assume control. The Government of Cuba, which shall be definitely recognized by the United States, and may thereafter claim recognition from other nations, must be organized or ratified by the people of Cuba, freely deliberating and acting under the protection of our impartial authority. Although the United States will not assume to present Cuba with a plan of government, they should condition recognition upon the adoption of a plan which shall establish a new nation upon principles of justice.

“ A further condition of recognition may be the ratification of a treaty containing such engagements and guarantees as may be necessary to secure the interests of the United States.”<sup>1</sup>

I see no reason for altering these opinions. I have attributed a broad meaning to that “ pacification ” of Cuba, which is to be a signal for our withdrawal (*The Law and Policy of Annexation*, page 177) ; and I do not condemn the Resolution of 1901 merely because it contains conditions, but proceed to examine its several articles in a convenient order.

### III.

#### THE FIRST SEVEN ARTICLES.

4. That all acts of the United States in Cuba during its military occupancy thereof, are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

This article recognizes the obligation of the new republic to consider the military government of the United

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<sup>1</sup> Notes on the Foreign Policy of the United States, June, 1898, p. 6.

States as its legitimate predecessor, an obligation imposed independently by the principles of public law commonly accepted by civilized people. Even a *de jure* government coming into its own upon the collapse of its *de facto* predecessor is generally expected to respect private rights which have vested under the usurper, to respect his laws until they shall be changed, and to refrain from punishing persons for obeying his orders.

The chief interest in this article is likely to center upon its effect upon private claims to property arising during the military *régime*. On principle, as well as by the terms of the article, the new government of Cuba is not obliged to respect as a vested right any claim to property based upon an act of the military government. To confer a vested, or in the phrase of the article a "lawful" right, the military government must exercise lawful powers, and the question is what restraints are imposed upon it.

A notable restraint is imposed by the act of Congress of March 3, 1899, ordaining that "no property, franchises or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States."

Possibly some restraint may be inferred from provisions of the Treaty of Paris under which the United States formally occupied the island. Although the treaty is an agreement between the United States and Spain, it is a public record of obligation to which Cuba may be entitled to refer as a real party in interest.

Finally, while a military government in a foreign land, even a friendly and peaceful country like Cuba enjoys such vast powers that it may be said to be a law unto itself, it is not generally, and certainly the government in Cuba is not, a shapeless power without any law of its being. On the contrary, we have here a power of orderly, though simple, structure exerting authority according to some rule of procedure; and we perceive that the "acts" competent to create vested rights are essentially "laws," which indeed are the only source of "rights." And reminding ourselves that these laws are simply the decrees of a military government, we conclude that the "lawful rights" contemplated

by the article are such only as are based upon orders issued in conformity to the rules of this government. Evidently a claim of property based upon a decree issued in violation of the military rules is not entitled to respect at the hands of the new government.

#### IV.

6. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

Possibly some private interests would be promoted by distinguishing this island from the "Cuba" in which Congress has forbidden all grants of "property, franchises or concessions" during the term of our occupation, but, be this as it may, I shall assume that the matter will be determined by public considerations.

Assuming that the ownership of the island is reserved for negotiation between friendly states, each ready to ascertain and respect the rules of public law, I think it will fall to Cuba for this reason, among others, that the Spanish dependency we set out to free and, in the Treaty of Paris undertook to occupy temporarily, included the Isle of Pines in one of its provinces. However, the disposition of the Isle of Pines does not appear to be a matter of vital importance. While its retention by the United States might be resented as an abuse of power it would detract little from the physical integrity of Cuba, and nothing from her political independence.

#### V.

5. That the Government of Cuba will execute, and as far as necessary extend, the plans already devised, or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba as well as to the commerce of the southern ports of the United States and the people residing therein.

Yellow fever in Cuba has long menaced the United States, and, at times, has been carried here in despite of our efforts. The United States, now having opportunity, may

justly demand a reasonable assurance of immunity. But the purpose of this article is very broad, including the welfare of Cuba as well as that of the United States. Would it not be better to limit our expressed concern in the sanitation of Cuba to the protection of our own country? Broad reasons of state, which I shall consider later, dissuade us from assuming a more intimate concern in Cuban affairs than is absolutely necessary, and in point of fact protective measures demanded for our own safety must tend, in themselves, to better the condition of the island.

Coming to the practical recommendations of the article, we find that sanitation is to be effected by executing "plans already devised, or other plans to be mutually agreed upon." Possibly "the plans already devised," which are to stand until changed by agreement, are formulated so precisely that any disregard of them can be brought to the notice of the Cuban authorities as a palpable breach of contract. Yet, considering the vexed questions in sanitary science, and the seeming aversion of Cubans to costly expenditures for the cleansing of cities, there seems to be room for much irritating controversy, with the advantage on the side of Cuba, in whose hands alone is placed the execution of sanitary measures. The United States have only the right to complain.

Viewing the article as a whole it appears to evince a very broad interest in the sanitation of Cuba without asserting an effective control in respect of the vital matter—the welfare of the United States. We can complain to Cuba should yellow fever enter our country through her neglect, but we cannot prevent its being carried from the island.

I do not advise that the United States request the general power of sanitary police in Cuba, for among sovereign powers none is more searching and despotic. Cuba could not be independent with a corps of United States officials suppressing nuisances, installing works of sanitation and sending the bills to the local taxpayers. But by narrowing our interest in the sanitation of the island to the point of our intimate concern, could we not properly request efficient powers for our protection? Would it be unreasonable to ask that, for a term of years at least, vessels clearing



from Cuban ports should carry a clean bill of health from United States officials stationed therein and having a jurisdiction defined by agreement? This would not involve a discreditable impairment of Cuban sovereignty, and foreign states could not justly infer a political union between the United States and Cuba because in the ports of the island we exercised powers beneficial to the world at large.

## VI.

2. That said Government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after detracting the current expenses of government, shall be inadequate.

This article commends the wholesome principle that a state should not borrow beyond its reasonable ability to repay, but does not define it. "Reasonable sinking fund," "ordinary revenues," "current expenses of the government" are very flexible terms in the very flexible processes of public finance. Perhaps the first may be practically determined in some measure by accepted principles of finance, but there is no legal standard of reasonableness. Then what, broadly speaking, are the current expenses of a state if not whatever the state spends, without regard to the items? Perhaps, as a matter of convenient bookkeeping, interest and sinking fund charges should not be included in a current expense account, but this is not required by any general rule applicable here; and even if it be assumed that this method of accounting is intended to be prescribed for Cuba by the particular law of this article, we are still unable to attribute precision to the article as a whole: For what are "ordinary revenues?" Clearly these include at the very least all proceeds of taxation, and if no limit be set upon the taxing power of a Cuban government, how can we avoid the conclusion that the "ordinary revenues of the island" will include whatever taxes the legislature may choose to levy?

In fine, the requirement that the sums applicable to sinking fund and interest charges shall be the difference between "current expenses," which perchance may here be partially defined, and "ordinary revenues," which depend upon an unlimited taxing power, is too vague to suggest in

itself an effective restraint on legislative borrowing. There seems to be nothing in the phraseology of the clause to disable a Cuban government from lawfully borrowing money to any amount and upon any terms to which lenders may agree, provided the authorizing statute embodies a scheme of taxation which on its face is not inadequate. The taxes may thereafter be lowered or repealed or diverted, they may not be collected, current expenses may be vastly increased, all to the damage of the sinking fund and interest; but the debt is incurred and remains a charge upon the island.

Further scrutiny of this article suggests the question whether it does not inadvertently deprive the Cuban government of an ordinary use of its public lands. The lands may be sold forthwith or leased, but the requirement that any public debt shall be secured by the ordinary revenues of the island seems to forbid the pledging of these lands as the immediate security for loans. Yet a Cuban government may find in a prudent administration of its landed estate an available method of raising and redeeming the loans it may require.

What I have written has regard to loans for the use of the new government of Cuba. In addition, the article is evidently intended to apply to the assumption of loans heretofore negotiated by other borrowers; that is to say, by the late revolutionary organization in Cuba and by Spain.

Now, the bonds issued by the revolutionary organization have no legal standing anywhere, because the organization itself never had a legal existence. Nor will the installation of a new government of Cuba confer retroactively a status upon the old organization, as might be the case where a well organized insurgent government, especially one enjoying the left-handed status of a belligerent, finally attains to the dignity of a sovereign state. The revolutionary organization will be the ancestor of the new republic in a historical sense only. Nevertheless, the publication of the details of the revolutionary loan may disclose equitable claims upon the new government which it will be bound in honor to acknowledge.

The bonds issued by Spain on Cuban account are legal

obligations. During the negotiation of the Treaty of Paris Spain demanded that this debt be expressly recognized as a charge upon Cuba, and, as an alternative, she pressed the United States to accept a cession of the island, with the idea that liability would accompany proprietorship. The demand was refused. The question of inferential liability was avoided, the United States assuming merely provisional control, and leaving the proprietary title to the island in suspense. Thus the Treaty of Paris did not settle the question of the Spanish bonds. On the contrary, the appearance of a sovereign proprietor of Cuba at the termination of the provisional régime will afford the first opportunity for presenting a formal demand on account of these bonds to a government competent to consider it. Whether there will be any demand presented on account of the Spanish debt, or if so, in what form and for what amount are speculations beyond the scope of this paper, though it may be suggested in passing, that while the vast sums for which Spain obligated herself in order to combat insurrection are not a proper charge on the island, it is not impossible that equitable claims may be presented on account of borrowed moneys actually expended for the permanent benefit of the island. Returning to our subject, I find that the clause may suffice to discredit an assumption of Spanish or revolutionary debts by an act of the legislature simply acknowledging liability, because it requires a concurrent provision for payment; but it is not perceived why, under the taxing power, this provision might not be made. Certainly if recognition by Cuba of enormous debts contracted to her hurt is a real danger to be apprehended, this article contains in itself no assurance of protection.

But even conceding more definite and meritorious possibilities to this financial article than I can perceive, there remains the critical question whether its effective application rests with the United States alone or with Cuba alone. One or the other must prevail. There is no provision nor indeed any reason for joint action. In the first case we must suppose that if Cuba wishes to borrow one million or one hundred million dollars—the amount is immaterial—she must first submit the project to the United States. The

President would naturally receive the communication as our representative in foreign affairs, and I think that considerations of law, to say nothing of convenience, would warrant him in disposing of the matter without the concurrence of Congress. The President of the United States would be the arbiter of Cuban loans. At this point some one, convinced that the United States must exercise a certain supervision over Cuban finance, may demur to this procedure as being unnecessarily drastic, but it must be insisted that unless supervision includes a power to restrain an issue of bonds, it is unsubstantial, for bonds once marketed become specific obligations. The President would take time to examine the project which, meanwhile, might be so prejudiced by a change in market conditions as to require its abandonment, or else its revision with the risk of further vexations.

Should the project be approved by the President and the loan floated, would not the United States be considered, as in some sense, its guarantor? I am not suggesting, of course, any legal liability, even in the broad meaning of international law, but the mere fact of setting our seal upon Cuban bonds must give them a certain currency in the market, and, in the event of repudiation, a possibility which no care in the creation of a national loan can certainly prevent, we would probably be requested to bring the delinquent to terms. Such a request we could not refuse with the excuse, which has accompanied our waiver of suggestions that we should press delinquent States of the Union to satisfy foreign bondholders, that the creation and redemption of State debts are alike beyond the competency of the Federal Government—the bonds of Cuba would be issued under our auspices.

Fortunately for the present convenience of the United States this financial article seems to accord to us no right of interposition, for the short reason that such a right, being in derogation of Cuban sovereignty, must be plainly expressed. I think we must view this article as a rather vague declaration of principle to be interpreted by Cuba alone; not an efficient restraint upon improvident borrowing, yet by its mere presence tending to the disadvantage of Cuba in all financial negotiations.

The reason paraded for our interest in Cuban finance is that otherwise Cuba might incur obligations which a European state might attempt to enforce in behalf of its citizen bondholders. Space will not permit a discussion of the interesting questions as to when a state may present itself before a sister state as the imperious agent of injured bondholders, and what pressure it may properly bring to bear upon the sovereign debtor whom no process of law can reach. Commonly these questions lie within the domain of statecraft, rather than in that of international law, and are active when a state finds it convenient to press a creditor's complaint in order to further some political design: Witness the action of France in seizing upon the repudiation of the notorious Jecker loan as a pretext for invading Mexico. Regarding any apprehension of enforcement of Cuban obligations by conquest, I have only to say that declarations in treaty or constitution are not needed to warn a European state that to conquer Cuba it must defeat the United States. Regarding action not amounting to conquest which one government may take against another in behalf of citizen bondholders, Cuba should take its chance with our other neighbor states, the United States governing their own conduct by the circumstances of the case.

The true reason for professing an intimate concern in Cuban finance is the desire to annex the island without annexing at the same time heavy obligations. Should Cuba be annexed without concurrent admission to statehood, the United States would be responsible for the entire national debt of the island however secured, for all public powers and all public property would pass into their hands. And the United States would be responsible for all provincial and municipal debts in this sense that, having the whole power of taxation in their hands, they would be bound to exert this power, which is always the ultimate security for public debts. Our Government could no more plead irresponsibility for the debt of Havana than for the debt of the City of Washington.

Should Cuba be annexed as a state of the Union there might be a demand for an equitable apportionment of indebtedness between the Federal and State Governments;

though on the annexation of Texas it was agreed between the United States and Texas that the former should not be responsible for any part of the Texan debt, the latter retaining all public funds and dues, and all other public property excepting that pertaining to national defense. Thereafter we dismissed the suggestion that, as we had taken over from Texas the power to levy customs duties, we should assume a portion of the Texan debt originally charged upon such duties; but, after appropriating certain lands claimed by Texas and pledged for her debt, we paid indemnity.

Without anticipating the possible difficulties attending an apportionment in the case of Cuba, it may be suggested in a general way that a specific debt should be a charge upon that government, state or federal, which becomes entitled to property pledged to secure it, or to public works constructed with its proceeds, or becomes invested with power to raise the revenues upon which the debt is a proper charge.

While I criticise this financial article I am not prepared to say that the United States should disclaim all concern in the establishment of Cuban finance upon a basis which promises at least a prudent use of borrowing powers. The best basis would be a limitation on the creation of indebtedness embodied in the Constitution of Cuba, and so clearly defined that prudent financiers would only subscribe to valid loans, and reckless speculators would have no right to complain of the non-payment of invalid ones. By this constitutional method many cities in the United States and some of the States have sought protection from evils attending an unlimited power to create public debts, and a Cuban Convention would not impair the dignity of the new republic by following their example.

## VII.

I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise lodgment or control over any portion of said island.

So far as this article bespeaks the freedom of the island from European domination it contemplates a condition predetermined by the United States. Of all our policies regarding America none is so widely accepted at home and so thoroughly known abroad as our determination that Cuba shall not pass into the control of a European power. During the Spanish domination the United States declared more than once that neither by purchase or conquest should Cuba be transferred to another European state, and refused to agree with Great Britain and France to maintain the *status quo*, on the ground that our interest in the island was singular and paramount.

The expulsion of Spain has emphasized this policy : Our power to enforce it has been vastly increased. Is it advisable to define now this traditional policy, and seek a legal sanction of questionable value for a position hitherto developed by the flexible and convenient methods of diplomacy ? The policy can gain no strength from law, and might lose some of that elasticity which should distinguish all foreign policies. Our interest in the independence of Cuba, or, to speak plainly, our concern in having a harmless neighbor on the island instead of a powerful one is essentially arbitrary, and it should be dissociated from all legal forms and obligations. And for this broad reason I would eliminate from the Treaty the provision that Cuba shall not give any lodgment to a foreign state. Instead of formally asserting our concern in this matter let Cuba follow the lead of other Spanish-American republics and forbid in her constitution any session of land to a foreign state, making the prohibition broad enough to cover the acquisition of any interest whatever, excepting, of course, for diplomatic and consular purposes.

The contingency of Cuba's seeking union with, or being invaded by another Spanish-American state need not be contemplated in a treaty. The attitude of the United States in either event may safely be left an open question.

## VIII.

7. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will

sell or lease to the United States lands necessary for coal-  
ing or naval stations at certain specified points, to be  
agreed upon with the President of the United States.

While the war with Spain was in progress I said, in anticipation of our victory : "Thenceforth the United States will enjoy acknowledged supremacy in the Gulf of Mexico and the Caribbean Sea. Outposts in the West Indies will be the visible signs of supremacy ; and it may appear that one or more of these may be located in Cuba itself, as well to the advantage of the Cubans as our own."<sup>1</sup> And I am still of the opinion that the promise of the Resolution of 1898 does not forbid necessarily an honorable demand for a couple of stations in Cuba. But the demand as presented in this Article is verbose and imperfect.

Three reasons for acquiring stations are expressed, whereas reasons are superfluous when, as here, they impose no real limitation on use. The United States occupying stations may, in fact, utilize them for making a conquest of the island as well as for the friendly purposes specified.

The demand is imperfect. There is uncertainty of title—"Cuba will sell or lease \* \* \* lands necessary for coal-  
ing or naval stations." Will our possession be permanent or temporary? Will land leased or even sold for a specified use pass within our jurisdiction for other purposes? May land acquired as a naval station be used as an army post? There is uncertainty of location. The number of outposts, their sites, their areas is not defined ; yet in view of our promise to Cuba, the propriety of this demand depends largely upon its objective points. The island will be left substantially in the control of its people even though outposts of the United States be located at Cape Maysi and Cape Antonio, but what if they be maintained at Havana and Santiago? There is, in terms at least, uncertainty of execution—Cuba will transfer lands to the United States when it comes to an agreement with our President upon the particular tracts.

To the end that the United States may acquire full sovereignty over such tracts in Cuba as it may honorably demand, there should be substituted for this Article one

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<sup>1</sup> Notes on The Foreign Policy of the United States, June, 1898.



commencing "Cuba cedes to the United States," and describing the desired tracts. And it might be advisable to separate the possessions of the United States from Cuban territory by a neutral strip, as Gibraltar is separated from Spain.

### IX.

3. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

"Intervention" is a very broad title in international law, but it always suggests the threat or use of force, and presumably involves some derogation from the sovereignty of the state in whose dominions it is exercised. "Intervention" covers pretty much every hostile act, short of the acts of formal war—note of warning, imperative demand, armed demonstration, invasion. This vast power is now demanded by the United States over Cuba as a treaty right, and we will first consider the several purposes for which it is expressly desired.

The first cause for intervention is "the maintenance of Cuban independence." This cause need not be expressed, for the reasons already given for leaving the entire question of independence to be dealt with by the United States in accordance with time-honored policy. A formal consent in advance given by Cuba would not materially strengthen this policy in action.

Another cause for intervention is neglect to discharge "the obligations with respect to Cuba imposed by the Treaty of Paris upon the United States, now to be assumed and undertaken by the Government of Cuba." What are these obligations?

It is argued that by virtue of the Sixteenth Article of this Treaty, the United States are in duty bound to assure performance by Cuba of the obligations which they assumed

by the First Article.<sup>1</sup> The First Article reads: "Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." The Sixteenth Article reads: "It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations." The obligations of the First Article, though, under the circumstances, not improperly assumed by the United States in form, do not depend upon formal assumption for existence. They are, essentially, duties imposed by the usage of the world upon any sovereign occupant of territory in respect of all foreign persons and property within its borders; and if the installation of a Cuban government still left the United States charged with securing the performance of these obligations by the new state, we would be involved in every petty trouble arising between Cuba and a foreign country. Fortunately, this vexatious consequence is not contemplated by the Treaty of Paris. The "obligations" of the First Article are not the "obligations" of the Sixteenth, according to international law, to say nothing of the text: The former inevitably cease with the termination of our occupation; and the United States are not called upon to "advise" a Cuban government to assume formally those international obligations attributed to all governments; though in this relation it should be recalled that, by the Fourth Article of this Joint Resolution, Cuba is to respect all rights, including the rights of foreigners, lawfully acquired during our occupation.

The "obligations" referred to in the Sixteenth Article of the Treaty of Paris, and which are not already fully executed, are contained in articles respecting freedom of religion, protection of Spanish copyright, free entry of

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<sup>1</sup> The Solution of the Cuban Problem, by Senator O. H. Platt, in "The World's Work," April, 1901.

Spanish scientific, literary and artistic works, etc. The United States should "advise" Cuba to respect these obligations. Probably they should be recognized in the constitution of Cuba. But to "advise" is not to "compel"; and the character of these obligations does not justify a formal demand for the tremendous power of intervention on their account.

The third cause for intervention presents the most serious question in the whole Resolution. The United States demand consent to intervene for "the maintenance of a government adequate for the protection of life, property and individual liberty."

In virtue of this clause any act committed in Cuba in violation of rights of life, property or liberty, seems to be an offense against the United States, whether the victim be a Cuban, or a foreigner of United States, or other nationality. It is understood that the Administration does not attach so extensive a meaning to the clause, and has informed delegates from the Cuban Constitutional Convention that the causes for actual intervention are limited to offenses of the very grossest description. Certainly this is an eminently proper anticipation, but executive comments and representations do not constitute an authoritative limitation on the words of this resolution of Congress intended to be some day embodied in a treaty.

A right of intervention is claimed in very broad, if not indeed vague, terms, and any Administration considering the question of exercising it may look to the terms for authority, and not to conversations between United States officials and Cuban delegates. Whether the right shall be exercised rarely or frequently, reasonably or unreasonably, are questions within the discretion of the United States, or, precisely, to note a point sometimes neglected, within the discretion of the President, who is charged with the execution of the treaties, as well as of the other laws of the United States. Intervention under the treaty will not necessarily be ordered by Congress.

The offenses covered by the clause may be divided roughly into two categories: Acts done in defiance of the Cuban government; *e. g.*, the acts of bandits and revolu-

tionists: Acts done by the authority of the government; *e. g.*, proscriptions and confiscations, and, possibly, the plain disregard by legislatures and courts of rights accorded by the Cuban constitution.

Intervening actively in cases within the first category the United States would act, nominally, as a policeman assisting a weak government to maintain the peace, yet inevitably substituting to a greater or less degree their own authority and their own responsibility for the authority and responsibility of the Cuban government. However vexatious this condition might prove to be there would, at least, be no state of war with its inconvenient consequences, unless, perhaps, we should drift into a conflict with the government we had set out to maintain.

In offenses of the second category, the Cuban government is itself the offender. Now, a strict construction of the clause might eliminate these offenses from its purview on the ground that Cuba consents to our intervention for the "maintenance" of a government whenever it is incapable of performing its duties unaided, and not for the purpose of calling to account a government guilty of willful dereliction. Without positively rejecting this construction, I think that the broader meaning I have given is correct, and that a Cuban government is asked to extend a formal invitation to the United States to chastise it for misdeeds, as well as to assist it in performing its duties. Intervening actively on account of offenses in the second category, the United States would appear as the enemy of the Cuban government.

## X.

The Third Article brings into prominence the great question of the proposed relation of the Cuban Republic to the United States, and this will be considered first from the standpoint of international law, and then in the light of the particular rule we have imposed upon ourselves in the promise "to leave the government and control of the island to its people."

There is nothing in the Joint Resolution to prevent Cuba from claiming and receiving that formal recognition which is the sign of membership in the family of nations. She

will enjoy notable prerogatives of sovereignty : The right to fly a national flag, to send and receive ministers and consuls, to negotiate treaties for all common and many extraordinary purposes, and to maintain an army and navy. Unlike a protected state, she will suffer no hindrance to foreign intercourse in the person of a resident representative of the protecting power, nor, like the South African Republic, will she be compelled by convention to submit her treaty projects to a "suzerain." A foreign state will find in Cuba a fellow-sovereign competent to observe all the forms, and assume all the responsibilities attending friendly international intercourse. And, in case of trouble, she will not find Cuba disabled by any provision of the Joint Resolution from redressing or resenting injuries without seeking the permission or assistance of the United States. Neither the Third, nor any other Article constitutes the United States the constant sponsor for Cuba. Whether a foreign state, pressing Cuba for redress of injuries, shall be confronted by the United States is a question of circumstance—in theory, as much a question of circumstance as our attitude toward foreign pressure upon Nicaragua or Colombia or the other Spanish-American states. It seems, therefore—though one hesitates to predict the precise status of a country like Cuba—that Cuba will be, in international law, neither a vassal nor a protected state, but an independent sovereign, shadowed, however, by an express liability to intervention from the United States.

From the independence of Cuba, internationally, we may infer important consequences. In the event of war between the United States and another nation Cuban territory ought not to be involved. Another consequence might be, that should we intervene against a Cuban government, we could not hold foreign nations from recognizing the existence of a state of war, by arguing, as England did in the case of the Transvaal, that we were merely chastising a vassal. I suspect that the notion that we could make this argument, provided we obtained Cuba's consent in advance, had something to do with the phrasing, if not the presence of the Third Article of the Resolution ; yet the argument, if not fallacious, would be dishonorable, for it is based on the

condition of dependency, whereas we have promised Cuba independence.

Does the independence of Cuba from an international standpoint relieve the United States from the imputation of violating in the Resolution of 1901, especially in the Third Article, the promise of the Resolution of 1898? Technically, I think it has this effect; and, still clinging to technicality, it may be shrewdly argued that anyway Cuba is not actually taken from "the government and control of its people," merely because the United States demand leave to intervene upon the happening of uncertain events. Technicalities dismissed, the United States will be defenceless against the charge of violating the spirit, if not the letter, of their promise, for they seek a formal sanction for what is potentially a power to interfere pretty much at pleasure with "the government and control" of Cuba. The effect of this breach of faith must be serious. The Cuban government, launched by the United States with an expression of contempt for its capacity, will inevitably be embarrassed by our mistrust: Stigmatized as an object of suspicion, is it not likely to lack the self-reliance essential to administration, and to fail in the end, if only because failure was taken for granted? Looking further afield, we may expect that repudiation of our promise to Cuba will intensify that mistrust of the United States on the part of Spanish-American republics generally which every interest of politics and business prompts us to allay; and especially may we apprehend its effect on canal negotiations with Colombia or Nicaragua.

The disadvantages to the United States in insisting upon the acknowledgment of a right of intervention are not outweighed by the advantages claimed.

Our political interest in Cuba is, as I have shown, safeguarded by ample power to enforce our established policy. Our business interests are large, and will increase to our profit and to the benefit of the republic of Cuba, which will find in the development of its resources and the employment of its people the best assurance of stability. The United States may accord due protection to these interests in virtue of their sovereign powers, without exacting a

humiliating concession from Cuba, and, considering the magnitude and propinquity of the interests, the powers will, without doubt, be exerted effectively in case of need.

## XI.

Summarizing the results of our inquiry ; Article I should be excised. A provision against cession should be incorporated in the Cuban constitution.

Article II should be excised because it deals ineffectively with the debt question. A debt limitation may be placed in the constitution.

Article III involves a breach of our promise to Cuba, and, moreover, an unnecessary demand for power.

Article IV is an adequate and useful statement of public law.

Article V should perhaps be narrowed in purpose to the interests of the United States quarantine, and be amended so as to secure their better protection.

Article VI does not call for a positive expression of opinion, for the possession of the Isle of Pines is not a matter of vital interest, either to the United States or to Cuba.

Article VII should be amended so as to give to the United States full sovereignty over specified tracts.

## XII.

### THE EFFECT OF THE RESOLUTION.

The Preamble to the Joint Resolution reads :

That in the fulfilment of the declaration contained in the Joint Resolution approved April 20, 1898, entitled : " For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to " leave the government and control of the Island of Cuba to its people," as soon as a government shall have been established in said island, under a constitution which, either as a part thereof, or in an ordinance appended thereto, shall define the future relations of the United States with Cuba substantially as follows :

And the Eighth and last Article provides :

That by way of further assurance, the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

The Preamble and Eighth Article furnish the text for a discussion of the practical bearing of the Joint Resolution on our conduct toward Cuba.

In the Preamble Congress treats the declaration of 1898 as a promise to be put in the way of performance by the act of our national legislature, though the President was competent to renew the pledge by his own act. The disposition of Cuba is a question of foreign policy within the immediate sphere of executive competency; the provisional government of Cuba is really a United States army under immediate executive control. And the President, being entrusted with the "pacification" of Cuba, had authority to determine the fact of its accomplishment, and thereupon to withdraw our troops and recognize a Cuban government. Congress has now interposed, and, by authorizing the President to withdraw upon its terms, has forbidden him to withdraw at his discretion. In this respect the Joint Resolution has the force of a statute imposing restraints upon executive action.

Restraining conditions are plainly defined in the first seven articles of the Resolution; and the word "substantially" in the last line of the Preamble does not accord to the President any power of qualification.

The Eighth Article suggests a vexatious question. The articles of the Resolution are not only to be embodied in the organic law of Cuba; "by way of further assurance" the first seven are to be incorporated in a permanent treaty with the United States. Is the ratification of this treaty a condition precedent, or a condition subsequent to withdrawal? If precedent, the President is ordered to retain physical control over the island until the terms of Congress have been made the subject of treaty contract between the United States and Cuba; in this case the treaty may be practically dictated by the United States. If subsequent, he is to withdraw upon the establishment of a government



in whose organic law the terms are incorporated; in this case a treaty would be the result of free negotiations, and the United States could not complain should Cuba, acceding to their conditions, insist upon trade concessions in return.

On the first hypothesis, a condition precedent is inserted in disregard of the letter of the Preamble, whereby the establishment of a government and the adoption of a specific organic law is the signal for our withdrawal. On the second hypothesis, the United States must leave the island without an agreement under which they can formally require the enforcement of their conditions. These will be merely inscribed in the organic law of Cuba, which, by itself, is an instrument that may be altered or disregarded without breach of contract. The constitution of a foreign country is not, as such, an object of lawful interest to the United States.

That the phrasing of the resolution permits this question to be raised is a serious blemish in the document; but, however it be determined, the Eighth Article suggests another question of broad constitutional interest, and perhaps of practical importance, no matter which way the first shall be decided.

Is Congress competent to direct the President, and Senate to make a treaty? Its authority to limit the executive discretion of the President in the matter of our withdrawal from Cuba, by prescribing its own conditions, is conceded. But the President, besides being the executor of the laws of Congress, is himself a legislator, for, with the advice and consent of the Senate, he is empowered to make treaties, which become, like the statutes of Congress, the law of the land. A statute may, indeed, deprive a treaty of all domestic obligation, but so may a treaty qualify a statute; and the courts, when required to decide between conflicting treaty and statute, will respect the later law. The treaty-making body and Congress being separate legislatures of equal rank, neither can compel the other to exercise its functions. Certainly the President and Senate cannot by treaty force Congress—we mean here the House of Representatives—to make the appropriation of money that may be necessary to effectuate it. Nor can Congress

force the President and Senate to make a treaty in accordance with its ideas, or prevent their making one in accordance with their own.

Applying this law of the Constitution in the present case, we find that should the Cuban Convention reject the terms of Congress, either flatly or by presenting modifications or explanations, and should Congress, through the opposition of the House of Representatives, decline to alter them, the President and Senate may still redeem our promise by way of a treaty. And we find further that the treaty contemplated by the Eighth Article, whether it be precedent or subsequent to our withdrawal, may be lawfully made without regard to the terms formulated by Congress. In short, while Congress has lawfully restrained the President from evacuating Cuba at his discretion, it has not prevented the treaty-making body from effectuating our withdrawal from the island at their discretion. And to appreciate the office of this body in regard to our relation to the Cuban Republic, we must bear in mind that every condition for which the sanction of contract is desired must be embodied in a treaty.

Whether the conditions now proffered by Congress shall be accepted or rejected by the Cuban Convention, they are not necessarily unalterable. It is difficult to see how, in any circumstances, our withdrawal from the island can be accomplished before the next meeting of Congress, and it is to be hoped that then our promise may be fulfilled by a single act—by a treaty which shall at once define and secure our conditions. The terms formulated in the Joint Resolution, which was linked to an Army Appropriation Bill and hurried through the last stages of a busy session, will then be scrutinized. Faithless and useless conditions will be dismissed, and our reasonable demands be definitely secured. A deliberate choosing of new terms may prolong our control in Cuba, but it is more important to withdraw in good order than to withdraw soon.

CARMAN F. RANDOLPH.